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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE SUSAN ILLSTON

GREGORY SHADE,)
)
Plaintiff,)
)
VS.) No. C 08-3471 SI
)
DANIEL PATRICK GORMAN)
individually and doing business as)
CHARLIE SEVEN FILMS, LLC,)
FRAMEBIRD MEDIA, CHIP R. BEASLEY,)
and ANDREW ELLIS,)
) San Francisco, California
Defendants.) Friday
) December 12, 2008

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

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Reported By: *Katherine Powell Sullivan, CSR # 5812*
Official Reporter - U.S. District Court

PROCEEDINGS

DECEMBER 12, 2008

10:15 A.M

THE CLERK: Calling civil 08-3471, Gregory Shade versus Daniel Gorman.

Counsel needs to please approach the podium and state your appearance for the record.

MR. GUPTA: Your Honor, Deepak Gupta appearing for Daniel Gorman, the defendant.

THE COURT: Good morning.

MR. GUPTA: Along with me is Tony Schoenberg.

MR. SCHOENBERG: Good morning.

THE COURT: Good morning.

MR. GUPTA: Also, Julie Wahlstrand appearing for the defendant. And Daniel Gorman, as well.

THE COURT: Good morning.

MR. CROSS: Your Honor, Robert Cross and Constance Yu for the plaintiff, Greg Shade.

THE COURT: Good morning.

Well, there are a number of motions on. They have been briefed. We have reviewed them. We've reviewed the materials submitted.

23 Is there anything that you all would like to add?
24 Let's see. It's mainly -- well, plaintiff is the motion for
25 preliminary injunction. Defendant is all the motions to

1 dismiss and strike.

2 I'll be happy to hear whatever any of you want to
3 add.

4 **MR. GUPTA:** Well, Your Honor, first, in relation to
5 our opposition to the motion for preliminary injunction, I
6 think a very key issue here is to give weight to the
7 significance of Mr. Gorman's work.

8 He's created a short film. It's a nonprofit film
9 that addresses an issue that's very important. It's very
10 current. And it's something that is in the public interest.

11 His movie is about public -- private armies fighting
12 the War on Terror. And he does it through a case study. The
13 case study is of the plaintiff, Mr. Gregory Shade.

14 With the trial going on now in Salt Lake City, we see
15 that private armies like Blackwater are an important current
16 issue.

17 What you'll find is that the fair use doctrine is
18 designed precisely to accommodate First Amendment concerns.
19 And for that reason, this type of movie falls squarely within
20 the core of that doctrine.

21 Now, on the motion to dismiss, Your Honor, if you
22 have some further questions on that I'll move on, but I'd like
23 to add one more point on the copyright opposition motion
24 preliminary -- our opposition to his motion for preliminary
25 injunction. And that's on the ownership issue.

1 On this, Your Honor, plaintiff has been an absolute
2 moving target. He has to show three things to get a
3 preliminary injunction. One, that he owns a copyrighted issue.
4 Two, that there's an infringement. Which is disproved by fair
5 use. And, three, that there's irreparable injury. The latter
6 (incomprehensible) in the Winter vs. NRCD case, by the Supreme
7 Court.

8 (Reporter interrupts.)

9 **MR. GUPTA:** Sorry.

10 But on the ownership issue, he's been an absolute
11 moving target. If you look at paragraph 15 of his complaint,
12 the allegation is that Gorman created, compiled and edited the
13 work that is allegedly infringed, which he calls the compiled
14 video footage, which Gorman has testified and has provided
15 testimony that's largely undisputed, was a Congressional
16 documentary.

17 It was a work that Gorman created. He authored it.
18 He took 19 hours of footage, boiled it into a few videotapes,
19 which the plaintiff and Gorman took to Capitol Hill and shared
20 with various congressmen to illustrate the activities and
21 travels of Mr. Shade.

22 Now, Mr. Shade's claim for ownership in his complaint
23 for that material is based on a work-for-hire allegation. In
24 deposition it was clear there is no work-for-hire claim here
25 that can be supported, because the Supreme Court precedent is

1 clear that you need to have a written agreement in this type of
2 situation. And he doesn't have that type of agreement.

3 He admitted Gorman was an independent contractor, it
4 was all taken at -- all worked on in Gorman's studio. So
5 Gorman is the author. He took the raw reality footage, turned
6 it into a work that -- of which he is the author.

7 **THE COURT:** What is the relationship between the raw
8 reality footage and the completed work, as a legal proposition?

9 **MR. GUPTA:** Well, there's -- there's the raw reality
10 footage, which was taken in Central Asia and the Middle East.
11 That was brought back -- by the way, that was taken by a number
12 of various Afghani people who actually were working the camera,
13 and that sort of thing. So there's an open question as to
14 whether Shade can even claim ownership of that. That's
15 governed by Afghani law. You'll find nothing on Afghani law in
16 their papers.

17 And the Itar case that we cite establishes that it's
18 the site as to where the work was created that defines
19 ownership. That, he brings back. He says, hey, I'm a
20 businessman. I had ideas about the War on Terror. I'm not a
21 moviemaker.

22 He goes to Gorman and says, Boil this down into a
23 four hour or so piece that we can share with people, that will
24 have some audience appeal.

25 Gorman does that. Gorman goes through it. He

1 selects the best stuff. He edits it. He compiles it. He
2 directs voice-overing of that. He includes music in that. And
3 he makes it something that, you know, a congressperson or CNN,
4 et cetera, would be able to sit down and watch. It's not just
5 19 hours of raw.

6 That material was taken by them, the two of them, to
7 Capitol Hill. They shared it with Congress. They give it to
8 CNN and they give it to Discovery Channel, hoping it will be
9 rebroadcast.

10 **THE COURT:** Now, as to that, who, if anyone, do you
11 think owns the copyright?

12 **MR. GUPTA:** It's our contention that Gorman is the
13 author of that work. Under the copyright, he's the owner of
14 that work. That is the work that is allegedly infringed.

15 So if you look at paragraph 33 of the complaint,
16 they're saying, well, it's this compiled video footage that was
17 created, quote, as a work for hire. Turns out there's no
18 work-for-hire agreement that Gorman infringes. Gorman can't
19 infringe the work that he's the author of, when there's no work
20 for hire even in place.

21 So, now, after this all comes to light, complete
22 180-degree turn, and Gorman didn't substantially contribute to
23 the work at all. And I don't think it's a tenable argument.

24 They put in two surprise witnesses on reply, that we
25 had to surreply to. And the surprise witnesses are notably

1 very vague on what they did, what Gorman did, if it's even the
2 same work.

3 So at the end of the day, Gorman can't infringe what
4 he authored. Major question on ownership.

5 Now, independent and beyond that is this issue of
6 fair use, whether or not he can establish ownership of
7 something, or the whole thing, or whatever.

8 We've got a short film here that uses about ten
9 minutes of footage. He repeatedly admitted in deposition that
10 20 minutes was a small amount. The key factors under the fair
11 use analysis are the transformativeness of the use and the
12 effect on the market.

13 There is really no dispute that this work is
14 transformative.

15 **THE COURT:** That might be the heart of the problem
16 here. It came out differently, I think, from what the
17 plaintiff expected.

18 **MR. GUPTA:** Oh, it sure did. In fact, that's --
19 that's sort of the inherent contradiction or the inherent
20 problem, the Achilles heel, of this whole case.

21 Because what you have is, by definition what's
22 upsetting to him about it is that, look, this casts him -- it
23 criticizes his position or it criticizes his activities.

24 And, by definition, under the preamble of the fair
25 use doctrine, criticism is within the court of fair use.

1 Particularly, broad use is accorded to political speech. And
2 the Wajnarowitz (phonetic) case is a very good example of that.

3 Recently, *Albert v. Aschcroft*, the Supreme Court
4 repeated that the First Amendment is enshrined in the fair use
5 doctrine. And if you look at cases like *Virginia vs. Black*,
6 political speech is at the core of the First Amendment.

7 The public interest is also implicated here. We're
8 talking about public funding. We're talking about how we're
9 going to protect the country. We're talking about core public
10 issues.

11 And the Diebold case, which dealt with voting
12 machines, is a very similar case that's on point, where this
13 was given weight in the first factor when you're talking about
14 the purpose and character of the use under the fair use
15 analysis.

16 Plaintiff can't dispute that this is reality footage.
17 Therefore, under the second factor, which is the nature of the
18 work, we have some very strong arguments that this is -- has
19 very weak copyright protection.

20 Moreover, plaintiff may try to argue that, well, this
21 wasn't published work. But the fact is, the work was
22 distributed to multiple news outlets. It was distributed at
23 Congress. There is really no question about publication.

24 Moreover, in the Diebold case you'll see language to
25 the effect where an e-mail archive was published in the public

1 interest. It's not -- the publication factor is not applicable
2 when there is no intention to publish the work at issue. He's
3 repeatedly stated in deposition he has no intention to publish
4 this work.

5 In reply, plaintiff said, well, this is the heart of
6 the work. And so because it's the heart of the work, you know,
7 this -- the third factor, the fair use analysis, is in his
8 favor. And that just can't be the case.

9 The heart of the work, first of all, as a matter of
10 fact, is not present when you're talking about 19 hours of
11 reality footage. There is no heart of the work. And, in any
12 event, this -- the heart of the work factor does not actually
13 carry the day when you basically have only as much use as is
14 necessary to convey your point.

15 And that's what Gorman did here. Gorman copied as
16 much as was necessary to convey his point. Which is to conjure
17 up this three-layer portrayal of kind of a news -- a news
18 portrayal of Shade and his War on Terror, which is something of
19 a sugar-coated view of things. What Shade was actually doing,
20 which starts to peek the audience's interest as to, well, is he
21 winning their hearts and minds, or is he very naive and
22 essentially untrained?

23 And then the third layer being this very troubling
24 interview footage to the effect that he's assembling a private
25 Army, he has his intention, he wants to work with the

1 government of the United States to do this, it's going to cost
2 him \$50,000. And he's essentially going to be judge, jury and
3 executioner. So you have that type of footage.

4 In that third layer you also have, for example,
5 quotes from Congressman Rohrabacher, to the effect that
6 patriots are mercenaries, and Greg is the ultimate patriot.

7 Well, that's a thinly-veiled implication that Shade
8 is a mercenary. Whether it's true or not, it's meant to make
9 the audience think about an issue that is very, very current
10 and very, very important.

11 Finally, the effect on the market prong. Here I
12 would point the Court to Diebold, Campbell, and Perfect 10. In
13 Diebold, the Court specifically said that, in the Northern
14 District -- well, Diebold has identified no specific commercial
15 purpose or interest affected by publication of the e-mail
16 archive, and there is no evidence that such publication
17 actually had or may have any effect on the putative market
18 value, if any, of Diebold allegedly copyrighted material.

19 Even if it is true that portions of the e-mail
20 archive have commercial value, there is no evidence that
21 plaintiffs have attempted or intended to sell copies of the
22 e-mail archive for profit.

23 Here, in deposition, Mr. Shade stated numerous times
24 that he's received absolutely no benefit from it; he has no
25 intention of using this material. And so this factor

1 manifestly weighs in favor of Gorman as well.

2 **THE COURT:** Okay. I need to ask you to wrap up.

3 **MR. GUPTA:** Okay. Your Honor, plaintiff -- one of
4 their arguments is, well, this is somehow a violation of the
5 parties' letter of intent.

6 The letter of intent was a one-week agreement. It
7 has no force today. It related to something very specific. It
8 related to a possible commercial venture. They were saying,
9 Let's talk about using all of this footage for a possible
10 commercial venture. Let's talk about using this footage in
11 ways that may not be fair use.

12 Well, if Gorman talks to Shade about possibly using
13 this stuff in an expansive way, to make a commercial or feature
14 film, that doesn't somehow divest Gorman of his rights to fair
15 use, to use the stuff in conformity with the four-factor test,
16 et cetera, et cetera.

17 So I think it's a red herring and it also doesn't
18 divest him from his ownership and authorship of the
19 Congressional documentary.

20 **THE COURT:** Thank you.

21 **MR. GUPTA:** And then I'll come back to the motion to
22 dismiss if --

23 **THE COURT:** I have heard enough about it already in
24 your papers.

25 **MR. GUPTA:** Okay.

1 **THE COURT:** Ms. Yu.

2 **MS. YU:** Good morning, Your Honor.

3 **THE COURT:** Good morning.

4 **MS. YU:** I hardly know where to start, since I
5 disagree with virtually every point made by --

6 **THE COURT:** Well, whatever you do, you need to do it
7 with dispatch.

8 **MS. YU:** I will do that, Your Honor.

9 What we have in this case is that over a two-year
10 period of time, Greg Shade shot and filmed the scenes in
11 Afghanistan and Central Asia.

12 There's actually no dispute about the authorship of
13 the camera work or the script. Defendant Gorman did not film
14 any portion of that in Central Asia.

15 Over 11 minutes of the 19 minutes in American Hero,
16 Gorman's work, comes from plaintiff's registered work that have
17 never previously been shown to the public before.

18 As to plaintiff's video --

19 **THE COURT:** Was it part of the thing that was given
20 to the Congress?

21 **MS. YU:** It was -- no. It's never been publicly
22 shown before.

23 I think what the Court is getting at is the issue of
24 publication. And that -- that issue I will describe as this:
25 Under the Copyright Act, publication is the distribution of

1 copies to the public by sale, transfer, and transfer of
2 ownership.

3 The offering of the -- to distribute copies doesn't
4 necessarily mean, for example, there are limited publications.
5 And the defense has offered no authorities for the
6 conclusions -- their summary conclusions that these were
7 published, just because they are still photographs used in
8 2002, and just because there was a CBS Dan Rather 60 Minutes
9 episode in 2003.

10 In fact --

11 **THE COURT:** I just need to understand what you have
12 said. Are you saying that, whatever you said, nine out of 21
13 minutes, or 19, whatever --

14 **MS. YU:** 11 out of 21 minutes -- I'm sorry, less than
15 20 minutes.

16 **THE COURT:** -- is footage that was not included in
17 the disks that were given to the congressmen, and not included
18 in the disks that were given to Dan Rather and whoever the news
19 outlets were?

20 **MS. YU:** Your Honor --

21 **THE COURT:** Is that what you're saying?

22 **MS. YU:** No. Let me correct that. Of the 11
23 minutes, it was definitely not used in the CBS. It was
24 definitely not used --

25 **THE COURT:** Was it given to them, is what I want to

1 know?

2 **MS. YU:** Okay. It differs. The answer differs based
3 on what it was. ABC and CBS did not get any of that material.

4 As to what was given to Congress, I think that's
5 actually unclear in the record. Phase 1, 2 and 3, which New
6 West produced, not Dan Gorman produced, and that is one of the
7 issues that was the result -- and resulted in the surreply, the
8 issue is that -- and I think that I would direct the Court's
9 attention to limited publications, under the Martin Luther King
10 case, as well as the Burke case, indicate that a limited
11 publication, when you give a clip to either -- whether it's
12 limited to five members of Congress, which were never
13 published, whether you --

14 **THE COURT:** You're saying it doesn't amount to
15 publication under whatever standards I need to apply under the
16 Copyright Act.

17 My question was different. It was just, was the
18 material on this ultimate 20 minutes or 19-minute thing, did it
19 include the 11 minutes that you're describing? Did that
20 include footage that was part of the disks given to the
21 Congress? That's what I want to know.

22 **MS. YU:** And I think the answer to that question is
23 it's unclear because we're not a hundred percent sure of --
24 there's nothing in the record that says what specifically was
25 given to Congress.

1 **THE COURT:** So you can't say it wasn't?

2 **MS. YU:** Well, and even if it were, the issue is --

3 **THE COURT:** You're saying it doesn't matter.

4 **MS. YU:** Right.

5 **THE COURT:** Okay.

6 **MS. YU:** I think what is also undisputed is that in
7 the case law relating to fair use, one of the issues that the
8 courts have examined is whether or not the use of it is in good
9 faith.

10 What has happened in this case is that defense has
11 conflated some of these issues of First Amendment. And -- and
12 what the case authority actually says is quite different. In
13 Harper, for example, and in many of these cases, the fact is
14 that Gorman only got portions of this because Greg Shade paid
15 him to edit it.

16 One of the cases we provided to the defense only
17 recently was Aalmuhammed vs. Spike Lee. That's 202 F.3d. And
18 the jump cite is at 1230 and 1236. Supplying voice-overs,
19 subtitles, writing script changes. And this is relating to
20 post production editing, which is what happened with Gorman.
21 Post production editing does not amount to co-ownership. The
22 law is very clear on that. And it is not -- Gorman does not --
23 is not entitled to ownership of the phases 1, 2 and 3.

24 And I think there's a question about credibility, as
25 well, since the New West folks indicated they are the ones who

1 created phases 1, 2 and 3.

2 So we think that the Estate of Martin Luther King and
3 Burke are the authority that basically says that the limited
4 publication to Congress -- not Congress, to the five members
5 that he specifically met with, do not constitute a publication.

6 As to each of the factors that Mr. Gupta has
7 indicated, the significance of Gorman's work, no one is
8 challenging Gorman's ability to do anything that's a First
9 Amendment right.

10 What we challenge is his ability to use our client's
11 materials, which he agreed to in advance that he would keep
12 confidential until the parties approved it through the letter
13 of intent.

14 And he states emphatically that this is a case study
15 of Plaintiff Shade. A case study of plaintiff Shade does not
16 create a parody. A parody necessarily requires that there's a
17 style that someone is mimicking. So this is more of a satire
18 than it is a parody. And since this was never made public, it
19 belies the concept that this could be parody of something
20 that's a known style.

21 The issue is that, also, you know, we've indicated
22 that we do not believe that Gorman is the author of any of it.
23 And if he is the author of anything, he would be the author
24 only of the editing that he says he did. But that's not what
25 the copyright claim is. And that's not what this claim is

1 here.

2 The defendant's counsel has indicated that Mr. Shade
3 indicated that they would share with the people. That's not in
4 the record anywhere. In fact, it's exactly the opposite.

5 What's in the record is that Mr. Shade was very
6 careful about what he used and what he disclosed, because he
7 was concerned about the identities of not only himself but
8 third parties in Afghanistan. He thought that the release of
9 the film would cause security issues for those individuals.

10 **THE COURT:** Where does it say in the letter of
11 intent, which is just a letter of intent --

12 **MS. YU:** Right.

13 **THE COURT:** -- of course, that it will be kept
14 confidential?

15 **MS. YU:** I'm sorry. That comes from the testimony.
16 But, certainly, it says that the -- the letter of intent says
17 that the final content must be approved by both parties.

18 **THE COURT:** Right. It doesn't say anything about
19 confidentiality.

20 **MS. YU:** You're right, Your Honor. But both parties
21 testified that Greg Shade was very concerned about the
22 confidentiality of the identities and, actually, of the film
23 footage itself.

24 And as demonstrated by the slam cuts in the actual
25 opposition brief, you can see the slam cuts are not portions

1 that are from the copyrighted -- the registered copyrighted
2 works. They're either video footage from the hotel room, which
3 our client has testified he was not aware that he was being
4 filmed, against, for example, a Dan Rather piece.

5 So it's not actually a juxtaposition of the
6 copyrighted material. In other words, the satire of the
7 plaintiff, as opposed to a parody.

8 And then the concept that Congressman Rohrabacher
9 indicated there was mercenary, that's sort of a -- even in Mr.
10 Gorman's own opposition they indicate, for example, that Dana
11 Rohrabacher indicated he was a mercenary without a gun. And
12 that's indicated in the -- in the -- in the declaration of
13 Mr. Gupta, at Exhibit N.

14 Finally, the defense seems to want to dismiss the
15 letter of intent as having no effect today, that only apply for
16 commercial venture. I'm not going to reiterate the issues that
17 are stated in our reply brief at page 5, but I would encourage
18 the Court to review that again, because Mr. Gorman's testimony
19 changed at every different -- every time he answered the
20 question.

21 First, he said the LOI only applies if it's a
22 48-minute film. It only applies if it's a commercial venture.
23 None of which is stated in the actual letter of intent.

24 I think the letter of intent is very clear. The
25 content had to be mutually agreed upon.

1 As to the issues relating to what, for the purposes
2 of preliminary injunction, we believe that Shade -- Plaintiff
3 Shade meets the requirements of the preliminary injunction
4 because there is a substantial likelihood of success on the
5 merits, particularly in light of the bad faith component in the
6 letter of intent.

7 It's just like Harper, when the nation knew it was
8 purloining a manuscript. It's similar to Sallenger (phonetic),
9 where the biographer knew that Sallenger did not want his
10 biography published during his lifetime, and knew that he did
11 not want to have his letters published.

12 And in Sallenger, similarly, the fact that the
13 letters were available at the university libraries for anyone
14 to check out did not constitute a publication.

15 Just like in Roy vs. CBS, the argument is that in
16 Roy, where there's a Charlie Chapman film, CBS got permission
17 to use it for a limited purpose. CBS got permission from the
18 Chaplin -- the people who own the Chaplin movies, to use it for
19 the purposes of an Academy Award tribute.

20 And at the point that Charlie Chaplin died, CBS, even
21 though it was very clear in their contract that that was a
22 one-time use only, for the Academy Awards, they then went and
23 used portions of it in the tribute.

24 Which the Court then said -- and to be clear, that
25 happened under the JNOV. It wasn't in the context of a

1 preliminary injunction. But that's another example.

2 The Court has consistently looked at the bad faith
3 component when it comes to how the defendants have used and how
4 they came to access the particular copyrighted material.

5 The final thing I would say as to balance and
6 hardship, it cannot be hardship for defendants because they
7 previously agreed under the LOI that they would get the consent
8 and approval of Greg Shade before they produced any film.

9 **THE COURT:** Thank you. The matter will be submitted
10 and you will hear from me.

11 Do we have a status today?

12 **MR. CROSS:** This afternoon, Your Honor.

13 **THE COURT:** I think it would be more profitable for
14 us all to have that in a week or two's time, when I can sort
15 out exactly what I'm going to do here. I think you'll be
16 better able then to gauge what the next step needs to be. My
17 suggestion is that we continue that probably until like the
18 early part of January.

19 **THE CLERK:** Actually, probably have to be
20 January 30th, because we're just really booked.

21 **THE COURT:** How does January 30th look for you?

22 **MR. GUPTA:** That's fine, Your Honor.

23 **THE CLERK:** Okay.

24 **MR. CROSS:** Should be fine.

25 **THE COURT:** That would be Friday, January 30th.

1 2 o'clock in the afternoon. All right. Thank you.

2 **MR. CROSS:** Thank you.

3 **MR. GUPTA:** Thank you, Your Honor.

4 (At 10:42 a.m. the proceedings were adjourned.)

5 - - - -

6

7 **CERTIFICATE OF REPORTER**

8 I certify that the foregoing is a correct transcript
9 from the record of proceedings in the above-entitled matter.

10

11 DATE: Wednesday, December 24, 2008

12

13 s/b Katherine Powell Sullivan

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15 Katherine Powell Sullivan, CSR #5812, RPR, CRR
16 U.S. Court Reporter

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